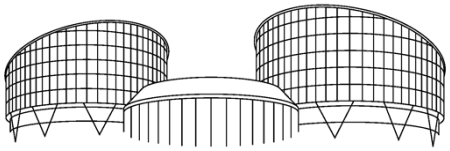

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MACHALIKASHVILI AND OTHERS v. GEORGIA

(Application no. 32245/19)

JUDGMENT

This version was rectified on 1 February 2023
under Rule 81 of the Rules of Court.

Art 2 (procedural) • Ineffective investigation into death of applicants' relative during a security operation for his arrest conducted on suspicion of terrorism-related crimes Art 2 (substantive) • Life • Due to insufficient evidence, Court unable to conclude beyond reasonable doubt that death occurred in circumstances engaging State's responsibility

STRASBOURG

19 January 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Machalikashvili and Others v. Georgia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Georges Ravarani*, President*,
Carlo Ranzoni,
Lado Chanturia,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 32245/19) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Georgian nationals, listed in the appended table ("the applicants"), on 6 June 2019;

the decision to give notice to the Georgian Government ("the Government") of the complaints under Articles 2, 3, and 13 of the Convention;

the parties' observations;

Having deliberated in private on 8 November and 6 December 2022,

Delivers the following judgment, which was adopted on the latter date:

INTRODUCTION

1. The application concerns the death of the applicants' relative (T.M.) as a result of a fatal wound to the head that he received in the course of an arrest operation conducted within the context of a terrorism-related investigation. The applicants complained under Articles 2, 3 and 13 of the Convention.

THE FACTS

2. The applicants, Mr M. Machalikashvili ("the first applicant"), Ms E. Machalikashvili ("the second applicant"), Ms N. Machalikashvili ("the third applicant"), and Ms A. Margoshvili ("the fourth applicant") were born in 1968, 1949, 1989, and 1971 respectively and live in the village of Duisi, Georgia. The first and fourth applicants are the father and mother, respectively, of T.M., who died as a result of a fatal wound to his head that he received during a security operation for this arrest carried out on 26 December 2017. The second and the third applicants are, respectively, his grandmother and sister. They were represented by Ms T. Samkharadze[1], Ms T. Mikeladze and Ms K. Chutlashvili, lawyers practising in Tbilisi, and

[1] Rectified on 1 February 2023: "Ms T. Samkharadze" has been added

Ms J. Evans, Ms J. Sawyer, Ms J. Gavron, Mr P. Leach, and Ms K. Levine, from the European Human Rights Advocacy Centre (EHRAC), lawyers based in London.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. BACKGROUND INFORMATION

5. On an unidentified date, a criminal investigation was initiated by the Counter-Terrorism Department at the State Security Service of Georgia ("the SSS") in respect of Akhmed Chatayev, a suspected terrorist, on account of his involvement with the so-called "Islamic State" ("ISIL"). According to Interpol, Chatayev was considered as one of the senior members of ISIL at the material time, who as of mid-2015 was in command of a Chechen faction of ISIL.

6. Following a special counterterrorist operation conducted by the SSS on 21-22 November 2017, after a twenty-hour siege of an apartment in Tbilisi, two suspected terrorists were killed, while Akhmed Chatayev carried out a suicide bombing. The fourth member of the group was arrested. On the basis of the evidence obtained prior to and after the above-mentioned special operation, the SSS identified five more individuals as being linked to Akhmed Chatayev's terrorist group, including T.M., the applicants' relative.

II. THE OPERATION FOR THE ARREST OF T.M. AND SUBSEQUENT DEVELOPMENTS

7. On 22 December 2017 the prosecution authority applied to the Tbilisi City Court requesting, within the scope of a criminal investigation pending into the terrorism-related activities of Akhmed Chatayev and his group, the arrest of the above-mentioned five persons, including the applicants' relative, and the search of their homes. According to the prosecution authority's application, the five persons allegedly knew of Chatayev's allegiance to ISIL and nonetheless provided his group with certain material support. In particular, they helped Chatayev's group to find accommodation in Tbilisi, and provided the group with food supplies and household items, and other services. There was accordingly a reasonable suspicion that the five persons, including T.M., had committed an offence under Article 331^1 § 3 (b) of the Criminal Code of repeatedly providing material support to Akhmed Chatayev and his terrorist group (see the relevant provision cited in paragraph 58 below). In substantiating the request for the arrest of the five persons, the prosecution authority relied on the following grounds. Firstly, there was a risk of those persons absconding in view of the severity of a possible sentence. The prosecution authority referred in this regard to the fact that the five

persons were aiding members of an international terrorist group and accordingly, there was a reasonable suspicion that they had links with other members of the terrorist group who could help them to flee Georgia. Secondly, the risk of their tampering with the evidence was referred to, particularly in view of the complexity and scale of the ongoing criminal investigation. Lastly, the prosecution authority argued that there was a risk of the five persons continuing their alleged criminal activities, particularly in view of the nature and specificity of terrorism-related crimes, which implied a high level of organisation and ideological allegiance.

8. As to the request to conduct the search of their homes, the prosecution authority argued, with reference to the same information, that there was a reasonable suspicion that the five persons, including the applicants' relative, were keeping arms and ammunition in their homes, and/or other important documents or objects for the investigation.

9. On 23 December 2017 the Tbilisi City Court authorised the arrest of five persons, including T.M., and the search of their houses. The judge concluded that there was a risk of their absconding and tampering with the evidence, and also the risk of their continuing their criminal activity. In this connection, the judge noted that terrorism-related crime was the most dangerous form of group crime and that there was a reasonable suspicion, having regard to the nature of the supporting material that had been provided, that the five persons would continue their criminal activity. On the same date the Tbilisi City Court also authorised the search of their homes. The judge concluded that there was a reasonable suspicion that the five persons had committed the impugned offence and that the evidential standard for conducting the searches had been met. The searches, were, hence, authorised for the purpose of seizing arms and ammunition and other important documents or objects for investigation.

10. On 26 December 2017, at around 3.45 to 4 a.m., the SSS Special Assignment Unit ("SAU") entered the applicants' house in order to arrest T.M. There were thirty-two SAU officers involved in the operation. SAU officer no. 1, followed by SAU officer no. 2, entered T.M.'s bedroom, which was located on the first floor (მეორე სართული) of the house. According to the investigation materials, T.M., having disregarded the request of the first officer to show his hands and surrender to the arrest, attempted to detonate a hand grenade and as a result was shot in the head. T.M. was immediately provided with first aid medical assistance by the SSS medical staff in the house and was then transferred sometime between 4.16 and 4.26 a.m. first to Akhmeta Regional Hospital and then to a hospital in Telavi, where he underwent surgery for his head injury. On 28 December 2017 the applicant was transferred to a hospital in Tbilisi, where, after almost two weeks of in-patient treatment, on 10 January 2018 T.M. died.

11. According to the case file, within about three hours of the special operation, at 7 a.m. on 26 December 2017, an investigator from the SSS

Counter-Terrorism Department, I.K., conducted a search of the applicants' house with the assistance of two crime experts and an explosive expert. The search, which lasted until 9.20 a.m., was also attended by the first applicant. As a result of the search, the investigator seized various items, including several mobile telephones from the ground and the first floors of the house, a computer processor from T.M.'s bedroom, and 23,600 Georgian laris (about 7,000 euros). He also seized a cylinder-shaped greenish object (later identified as a hand grenade) which was lying on the floor, to the left of T.M.'s bed. All of the participants in the search, including the first applicant, signed the search report. During the search, photographs were made.

12. According to the case file, after the search the investigator and the experts left the applicants' house without securing T.M.'s bedroom. The applicants, several neighbours and a local journalist then went to the bedroom, with the journalist taking photographs of the room. In two of the photographs taken by the local journalist, the applicants claimed to have identified T.M.'s iPhone headphones, which, according to them, had subsequently disappeared (see in this connection paragraphs 38 and 42 below).

13. On the same date, the SSS conducted four other special operations, arresting the four suspected accomplices of T.M. without any resistance on their part. According to the case file, they were eventually charged and convicted of providing material support and resources to a terrorist group, an offence under Article 333[1] § 1 of the Criminal Code. Criminal proceedings against T.M. were discontinued because of his death.

III. THE INVESTIGATION AND DECISION NOT TO PROSECUTE

14. On 26 December 2017 a criminal investigation was initiated into the circumstances in which T.M. was wounded, under Article 333 § 1 of the Criminal Code (misuse of authority) (cited in paragraph 58 below), by the Kakheti Regional Prosecutor's Office. On the same date, after the applicants had been questioned, the investigation was reclassified under Article 333 § 3 (b) of the Criminal Code (misuse of authority using violence or a weapon) (ibid.), and the case was transferred to the Tbilisi Prosecutor's Office.

A. Inspection of the scene and interviewing of the applicants

15. On 26 December 2017, between 4 and 5.50 p.m., an investigator from the Kakheti Regional Prosecutor's Office conducted an on-site inspection of T.M.'s bedroom, with the participation of two crime experts. During the inspection, which was also attended by the third applicant, T.M.'s sister, the investigator seized several pieces of evidence, including two pillowcases and a blanket, both containing blood stains. The report noted that there were two holes, one in the bedhead of T.M.'s bed and another one in the wall behind

the bed, at a height of 85.5 cm and 84 cm from the floor respectively. Metal fragments were extracted from the hole in the wall, which measured some 3 cm. As was noted in the inspection report, a search of T.M.'s bedroom had been conducted by the representatives of the SSS before the arrival of the investigator (see paragraph 13 above).

16. On the same date, the investigator in charge of the investigation interviewed the applicants. According to the interview report of the fourth applicant, T.M.'s mother, she and her husband had been woken up at around 3 a.m. by the sound of smashing doors, coming from the first floor of their house. She had then seen some light and heard the noise of what might have been a gunshot. Both she and her husband had quickly run outside their bedroom situated on the ground floor and seen several masked armed officers in the courtyard of the house. At that point the fourth applicant had lost consciousness for some ten minutes. When she had regained consciousness, she, her mother-in-law and her daughter had been taken at gunpoint to her bedroom and locked in there. The fourth applicant stated that none of the armed officers had physically abused or otherwise insulted them. In the morning she and her husband went to the hospital, where she had learnt that her son had been injured on his forehead.

17. According to the third applicant's, T.M.s' sister's statement, on the night of the special operation she was sleeping on the first floor of the house, in the bedroom next to that of her brother. At around 3.30 a.m. she had heard footsteps approaching, followed by the sound of smashing doors. She had immediately stood up, opened her bedroom door, and seen on the balcony, at the very entrance to her brother's bedroom, two armed and masked men, who had ordered her to lie down. She had obeyed their order, and within seconds she had seen one of the officers shooting in the direction of T.M.'s bedroom. She had then heard one of the armed officers saying that there was an injured person who required medical assistance. After the shooting, four more masked and armed officers had arrived at the balcony on the first floor. They had calmed the third applicant down and accompanied her downstairs, to join her mother and grandmother in one of the bedrooms. According to the interview report, the third applicant was allowed to enter her brother's bedroom only after several hours, when the SSS had left. She had seen his bed, a pillow, and the floor with blood stains on, as well as the damaged wall.

18. The second applicant, T.M.'s grandmother, stated in her interview that at around 3.30 a.m. she had heard the sound of smashing doors followed within seconds by a gunshot. She said that she had been locked by the armed officers in her bedroom with her granddaughter and daughter-in-law, and then moved to her neighbour's house.

19. According to the interview report of the first applicant, T.M.s' father, he had heard the sound of smashing doors at around 3.30 a.m., followed within a few seconds by two or three gunshots. He and his wife had run out of their bedroom but were prevented by some ten to fifteen armed and masked

officers from going up to the first floor. The first applicant had been forced to the ground at gunpoint in the courtyard of the house and was kept there for some ten minutes. He was subsequently escorted to his mother's bedroom on the ground floor and locked in there. The first applicant noted in his statement that after about three hours he had been told to attend the search of the house, first of the ground floor, as a result of which his mobile phone had been seized, and then of the first floor. When he was allowed to go to T.M.'s bedroom, he saw that his son's bedroom was turned upside down, which made him think that that the search of the room had already been conducted. Upon entering the bedroom, he had noticed blood stains on the floor, the bed and the wall behind the bed. When he had asked about the stains, he was told that T.M. had tried to detonate a hand grenade and had been shot in self-defence. The officers had stated that T.M.'s life was not in danger and that he had been taken to a hospital. The first applicant was shown a hand grenade lying on the floor, which, according to the officers, T.M. had tried to detonate. In reply to a question, the first applicant had stated that he had not been verbally or physically insulted and that he did not require any medical examination. He had also said that he did not believe that the hand grenade had belonged to his son.

20. The applicants were additionally interviewed in March, April and June 2018, and February 2019. In their additional statements they complained that they had been subjected to inhuman and degrading treatment during the special operation. For example, the first applicant alleged that he had been forced to the ground half-naked in the courtyard of their house and had been subjected to verbal and physical abuse. The second applicant alleged that she had not been provided with the necessary medical treatment for her epileptic seizure on time and was in addition not allowed to go to the toilets and had had to urinate in front of the armed security officers.

B. The evidence of the SAU officers and other evidence from the SSS

21. On 28 December 2017 the prosecutor in charge of the investigation wrote to the SSS asking for information about the identities of those who had participated in the special operation of 26 December 2017, the firearms used during the special operation, and the report of a responsible official concerning the conduct of the special operation. The prosecutor repeated his request on 4 January 2018. In a reply of 1 February 2018, a representative of the SSS provided a list of thirty-two officers who had participated in the operation, also indicating the firearms each of them had had with them that night. In the same letter, the prosecutor was informed that there were no audio, video or photographic files depicting the special operation. The prosecutor's request for the report concerning the special operation was left unanswered.

22. On 1 February 2018, SAU officer no. 1, the officer who had shot T.M., was interviewed. According to his interview report, the assignment in the operation in question was to arrest those affiliated with Chatayev's terrorist group. The instruction was to arrest the suspects alive and to avoid their "liquidation". Some other SAU officers had secured the courtyard of the house while others had been responsible for the ground floor. He had been told to position himself on the first floor of the applicants' house and to check the two rooms there. Before entering the first room on his right, SAU officer no. 1 had checked that the doors were not locked; he had also noticed light coming from the window. Then he had entered the room, followed by another SAU officer (officer no. 2). After taking two steps, he had seen T.M., who was awake in a half lying position in the bed, with his head slightly elevated over the pillow. T.M. was covered with a blanket which had prevented SAU officer no. 1 from seeing his hands. The officer had ordered T.M. to show his hands and not to move. T.M. had, however, taken off the blanket and reached out for a hand grenade on the right side of his bed. After grabbing the hand grenade, he had returned to his initial position and tried to detonate it. According to officer no. 1, at this moment, since he and the other officer were facing an imminent threat to their lives, he had acted in self-defence and fired at T.M. from his Sig Sauer model 516 gun, hitting him in the head. As a result, T.M. had dropped the hand grenade, which fell onto the bed. The officer had taken the hand grenade and put it, for security purposes, on the floor. In reply to a specific question, SAU officer no. 1 had maintained that they had been instructed to arrest T.M. and not to kill and/or injure him.

23. SAU officer no. 1 was subsequently interviewed several times. In his additional statement of 6 August 2019, he confirmed that T.M. had been lying in his bed with his body and hands fully covered, and that after reaching out for the grenade, he had returned to his previous position. In reply to a specific question, he noted that the lights had been turned on in T.M.'s bedroom and that T.M. had been awake at the moment of the officers' entrance into the room. He also dismissed as untrue the applicants' allegations concerning their degrading treatment and stated that the pre-operation instructions had been given orally. In his additional statement of 22 January 2020, he also stated that he had seen T.M. taking a hand grenade from the upper right side of his bed, and that he could not remember whether after the shot he had seen a mobile telephone in T.M.'s bed. As to the shot itself, he claimed that he had directly targeted T.M.'s head, as with a gunshot to his body there would still have been a risk of his detonating the hand grenade.

24. SAU officer no. 2 gave a statement identical to that of the first officer. He confirmed hearing the first officer demanding that T.M. show his hands. He had also seen T.M. reaching out for a hand grenade and trying to detonate it, at which moment the first officer had fired. The second officer noted that the SAU's assignment during the special operation was to arrest the suspected terrorists. In his additional statement of 22 January 2020, he stated that he had

not seen T.M. taking the hand grenade as he had been behind SAU officer no. 1. When he had seen T.M. with a hand grenade, T.M. had already been in a position which could have allowed him to detonate the explosive device. He also did not remember seeing a mobile telephone in the bed.

25. SAU officers nos. 3 and 4 confirmed in their statements the version of events as presented by the first and second officers. They stated that they had been on the balcony of the first floor when they had heard the gunshot. They had immediately rushed to T.M.'s bedroom; but it had taken them about fifteen to twenty seconds to get inside the room, as SAU officer no. 3 had become stuck in the entrance with his backpack, and SAU officer no. 4 had had to smash one wing of the door with his foot in order to allow them to enter. They noted that when they had entered the room, they had seen the hand grenade lying on a small carpet on the left side of the bed. The remaining officers were also interviewed on several occasions. They all gave identical statements, providing a short account of the operation and dismissing the applicants' allegations of degrading treatment as untrue. They also stated that the instructions before the special operation took place had been given to them orally; that they had been told that those to be arrested were affiliated with Chatayev's group and hence military resistance on their part was to be expected; and that the purpose of the special operation had been to arrest the suspects.

26. On 20 February 2018 two officers in charge of removing mines (explosive experts) were interviewed. According to their statements, they had both been waiting in a car in the vicinity of the applicants' house when the operation had started. Within several minutes after it had started, they had heard information on their radio communication devices about "the object" being injured, and the request for medical help. After some time, they had been called to T.M.'s bedroom, where they had seen a hand grenade lying on the floor on the left side from the entrance doors. Having neutralised the hand grenade, they had returned it to the same place. They had then inspected the room but had not found any other explosive materials. In reply to a specific question, they had stated that when they had entered the bedroom, T.M. had no longer been there. They confirmed seeing blood stains on the bed and the floor and said that they had been told by SAU officers about the way in which the operation had unfolded, including T.M. attempting to detonate a hand grenade and one of the officers shooting in self-defence.

27. On 18-19 April 2018 two SAU doctors were interviewed. According to their interview statements, they were in the village of Duisi when the special operation started. They had been waiting outside in a car specially equipped for providing urgent medical care. Some ten minutes after the operation had started, they had heard via radio communication devices that the "object" was injured. Within two to three minutes, they had been asked to go inside the applicants' house. When they entered what later appeared to be T.M.'s bedroom, T.M. was lying on the bed, unconscious, with a single

perforating gun wound to his head. They had provided him with urgent medical care, treated his wound, and transferred him with the help of a stretcher to their car. They had been informed by that time that the ambulance was on its way, however they had decided, in view of the urgency, to drive T.M. in the direction of the ambulance. After some ten minutes' drive, they had met the ambulance and transferred T.M. into it.

28. The SAU officers were interviewed again in August and November 2019, and then in January 2020. In their additional statements they confirmed that they had not been provided in advance with any written documents concerning the planning of the operation, that they had been instructed orally, and that some main points concerning the operation had been written on a whiteboard and then deleted. When asked about headphones, they all noted that they had not seen any headphones in T.M.'s bedroom.

29. On 14 August 2019, I.Ch., the head of the Counter-Terrorism Department at the SSS, was interviewed. According to the relevant interview statement, T.M.'s identity and that of four other individuals, was established within the scope of the investigation conducted into the activities of Akhmed Chatayev and his terrorist group. Those five people were suspected of providing the terrorists with material support, including household items and food. They were also suspected of helping to arm Chatayev. According to I.Ch., in view of their experience with the special operation of 21-22 November 2017, it was decided to involve the SAU in the special operation for the arrest of the five individuals on 26 December 2017. I.Ch. had briefed the head of the SAU, Z.Z., about the circumstances of the case, including the information they possessed about the five persons. He had told him that those persons were affiliated with the terrorists who had been "liquidated" during the November special operation and hence, they could have been equipped with firearms and explosives and could have provided armed resistance to the arrest. I.Ch. further noted during his interview that, after the location of the places of residence of the five individuals had been examined, on 25 December 2017 the operation had been planned for early in the morning on 26 December 2017. He had coordinated its conduct from Tbilisi, while his deputy P.J. was on the ground in the village of Duisi.

30. On 15 August 2019, P.J., the deputy head of the Counter-Terrorism Department at the SSS, was interviewed. According to his statement, the arrest operation was planned on 25 December 2017. In view of the affiliation of the five persons with Chatayev's terrorist group, the operation was planned on the assumption that the five could provide armed resistance. The head of the Counter-Terrorism Department, I.Ch. had ordered that the arrest operation be conducted with no casualties and that the special forces take all possible measures to avoid wounding or "liquidating" the suspects. P.J. personally went to the village of Duisi to oversee the arrest of two suspects, including T.M. According to the plan, the SAU officers were to enter the houses first to effect the arrest of the suspects and to secure the ground. They were then

to be followed by SSS investigators. The operation had started at around 3.30 a.m. After some ten to twenty minutes, P.J. had been informed by one of the officers (he did not know who exactly) via radio communication that one of the suspects was injured and required medical assistance. In reply to a specific question, he had stated that he had not participated in the search of T.M.'s bedroom. However, in order to prevent any complications that might be caused by the first applicant during the search, he had accompanied the investigators to T.M.'s bedroom and had seen the blood stains on the bed and the floor. He had also noticed a hole on the top of the bedhead and a hand grenade on the floor next to the bed.

31. On 19 August 2019 the deputy head of the SSS was interviewed. He stated that he had coordinated the conduct of the special operation of 26 December 2017 from Tbilisi together with I.Ch., the head of the Counter-Terrorism Department.

32. I.K., the SSS investigator who had conducted the search of the applicants' house in the immediate aftermath of the special operation, was interviewed on 29 May 2018, 7 August and 25 November 2019, and 23 January 2020. As to the circumstances of the search of T.M.'s bedroom, according to I.K.'s statement, the first two SAU explosives experts had been summoned. They had neutralised the hand grenade and searched T.M.'s bedroom for other potential explosives. Two crime experts were then called to conduct the search. In his additional interview of 23 January 2020, in reply to a specific question, I.K. noted that there had been no headphones in T.M.'s bedroom, particularly not on his bed. He also confirmed that he had not secured the scene because he had seized all the evidence he required for the purposes of the terrorism-related investigation. He also had not known that the investigation into the wounding of T.M. had started. Z.N., another SSS officer, who had participated in the search, confirmed the circumstances of the search in his interview report. He listed among the items seized from T.M.'s bedroom several mobile telephones and a hand grenade. He noted that the two parts of the neutralised hand grenade had been lying on the floor, on the left from the entrance door, and that one of the mobile telephones had also been found on the floor.

33. According to the case file, the SSS claimed that no audio, video, or photographic recording of the special operation had been conducted. In their letter of 26 June 2019, in reply to that of the prosecution authority, a representative of the SSS additionally noted that no written document providing for the planning of the operation or instructions for the SAU officers had been drawn up. The arrest operation was planned on 25 December 2017 and certain instructions for the officers had been drawn up on a whiteboard and subsequently erased.

C. The forensic examinations

34. On 3 January 2018 the SSS investigator I.K. sent the hand grenade and other evidence to the National Forensic Bureau and requested the organisation of a biological, ballistics, and dactyloscopic examination. The report on the dactyloscopic examination of the hand grenade, dated 10 January 2018, noted that the traces on the hand grenade were not sufficient or suitable for identification purposes and thus no useable fingerprints could be obtained. According to the ballistics report dated 19 January 2018, the hand grenade in question was a fully functional explosive weapon, until its destruction as a result of a firearms forensic examination. As to the biological report dated 30 January 2018, the experts noted that the red-brown stains on the hand grenade seized from T.M.'s bedroom were blood stains which corresponded to the genetic profile of T.M. According to the case file, the hand grenade was destroyed during the firearm's forensic examination.

35. On 23 January 2018 another ballistic report was issued concerning the metal fragments extracted from the wall behind T.M.'s bed.

36. On 12 March 2018 a forensic medical report was issued, according to which T.M. had had a penetrating gunshot wound on the left side of the forehead and an exit wound on the back of his head. The report stated that the head injury had resulted in T.M.'s death, and that a surgical intervention that T.M. had undergone following his wounding had prevented the expert from establishing the firing distance. The report also noted that the trajectory of the gunshot wound had been from the front to the back and almost horizontal.

37. On 21 December 2018 another forensic report was issued, according to which it was impossible to establish the exact position of T.M. at the moment he was shot owing to several possible variations of the exact location of his hands, legs and torso. At the same time, it was noted in the report that T.M. had been in a lying down position with his head slightly elevated, and that his sitting or standing could be ruled out.

38. On 29 November 2019 an expert report was issued following the examination of the photographs of T.M.'s bedroom taken by the local journalist in the immediate aftermath of the special operation (see paragraph 12 above). These photographs were compared with those taken by the SSS investigator during the search and subsequently by the prosecution authority during the inspection of the crime scene. After analysing the photographs, the expert concluded that, first, it was technically impossible to clearly establish what the white object (alleged by the applicants to be T.M.'s iPhone headphones) was which could be seen in the two photographs taken by the local journalist; and secondly, that object could not be seen on the photographs taken during the search and the inspection.

39. Several other forensic examinations were conducted within the scope of the ongoing criminal proceedings, including a forensic medical examination for the purpose of assessing the adequacy of the medical

assistance provided to T.M. following his wounding. According to the relevant report issued on 4 October 2019, while there had been a delay in providing T.M. with artificial respiration, it had no causal link with his death, and moreover all other stages of his treatment had been prompt, accurate and adequate.

D. Other evidence

40. During the investigation, a doctor and a nurse from Telavi Hospital were interviewed. They noted that T.M. had been taken to hospital at around 7.10 a.m. by an ambulance, that he had had a gunshot wound to the left area of his forehead, and that no other injuries could be seen on him. The ambulance doctors and a driver, for their part, noted that they had received a call at 4.21 a.m. and had immediately left for the village of Duisi, however, before they arrived, they had come across a car in the vicinity of the village of Matani, which had been driving T.M. in their direction. T.M. had been quickly transferred to the ambulance and they had driven him to Akhmeta Hospital. In reply to a specific question, one of the ambulance doctors noted that when they had first seen T.M. he had already been given first aid.

41. T.M.'s cousin stated in his interview that the last message he had received from T.M. on the morning of the special operation was via WhatsApp at 3.39 a.m.

42. On 22 January 2019 the local journalist, who took photographs of T.M.'s bedroom, was interviewed. According to his statement, he went to see T.M.'s bedroom sometime between 9 and 10 a.m., immediately after the police and the SAU officers had left. He remembered seeing red stains on the floor and the bed. There was a hole in the wall next to the entrance door just behind the bed, and there were pillows, bed sheets, a mattress, and bedcovers all over the floor with blood stains. He had taken nine photographs with his mobile telephone, recorded a short interview with the third applicant and left in order to come back with proper equipment. He had come back within some thirty minutes and noticed that certain objects in the room had been moved around. He had then taken sixteen photographs with his professional camera. In reply to a specific question, he showed a photograph taken by him, showing a small white object on a carpet next to the bed. He had identified this object as an iPhone earbud. He also showed another photograph, where another small white object could be seen. He noted that this object could have been an earbud or something else.

43. Several of the applicants' neighbours were also interviewed in connection with the circumstances of the special operation. According to the interview report of E.Ts., shortly after the special operation, when the SAU officers had started to leave, she had gone to T.M.'s bedroom with T.M.'s sister and had seen the bed sheets with blood stains on them. She also recalled

that early in the morning, journalists had come to see T.M.'s bedroom and she had shown them the blood stains in the room.

44. The prosecution authorities also interviewed the experts who had conducted various forensic examinations.

E. The applicants' involvement in the investigation and their access to the investigation file

45. On 9 January 2018 the applicants wrote to the prosecutor's office requesting that T.M. be granted victim status. The request was refused, with the prosecution authority noting that the investigation was in its active phase, many investigative actions were yet to come, and there was no sufficient basis to conclude that T.M. was a victim of a criminal offence within the meaning of Article 3 § 22 and Article 56 § 5 of the Code of Criminal Procedure ("the CCP" – see the relevant provisions cited in paragraph 59 below). Following T.M.'s death, on 16 January 2018 the applicants sent a new request, this time requesting victim status for T.M.'s father, the first applicant. That request and the applicants' subsequent appeal to the superior prosecutor were refused with the same reasoning as previously given on 18 and 25 January respectively. The superior prosecutor in addition noted that the applicants could nevertheless enjoy certain procedural rights, such as requesting information on the progress of the investigation, requesting the conduct of certain investigative actions, and having access to the unclassified parts of the investigation file. Following several other refusals to grant the first applicant victim status, on 12 April 2019 the applicants challenged the prosecution authority's decision in court.

46. On 25 April 2019 the Tbilisi City Court rejected the applicants' application, confirming the reasoning of the prosecution authority. The judge found that Article 3 § 22 and Article 56 § 3 of the CCP envisaged the granting of victim status only to a person who had incurred damage as a result of a criminal offence. He further referred to a decision of the Constitutional Court in which it stated the following:

> "the [decision] on granting or withholding victim status is not entirely within a prosecutor's margin of appreciation. The law provides for objective grounds and criteria, the existence of which makes it obligatory for the prosecutor to recognise a person as a victim or to withhold his or her victim status. When a prosecutorial decision is appealed in court, the court examines the legal and factual grounds for such a decision without interfering with the discretionary powers [of the prosecutor]."

47. The Tbilisi City Court thus accepted the reasoning of the prosecution authority to the extent that there was insufficient evidence showing that T.M.'s death had been caused by "criminal conduct" of the SSS officers and thus the first applicant did not "merit" to have victim status.

48. On 2 December 2019 the applicants' representative reiterated her request for the first applicant to be granted victim status. On 6 and

18 December 2019 the prosecutor in charge and the superior prosecutor, respectively, rejected the request. The applicants appealed claiming, among others, that the granting of the victim status was dependent on the existence of allegations of a criminal offence and not on the proof that a criminal offence has been committed. On 12 January 2020 the Tbilisi City Court rejected the applicants' application. The judge found that the granting of victim status rested upon the existence of three pre-conditions: first, the subject being a State, a physical or a legal person; second, who had suffered non-pecuniary, pecuniary or physical damage; and third, directly as a result of a commission of a crime. The judge reasoned that at the relevant moment no causal link had been shown to exist between the unlawful acts of the SAU officers and T.M.'s death.

49. According to the case file, the applicants' representative was allowed to inspect the case file on nineteen occasions at the prosecution authority's office, including the classified files – three times on 10, 22, and 23 January 2020. In addition, the prosecution authority granted the applicants' request to conduct certain additional investigative measures, such as the examination of photographs of T.M.'s bedroom taken by a local photographer in the immediate aftermath of the operation, with a view to clarifying the issue about the headphones; the conduct of a re-enactment scene, with the purpose of establishing T.M.'s exact position at the moment he was shot; and re-interviewing several of the SSS officers.

50. The applicants also lodged multiple applications and complaints concerning the scope and the manner of the investigation. For example, in their letter to the prosecution authority of 3 July 2018, the applicants noted that T.M.'s mobile telephone and what appeared to be his iPhone headphones appeared to have been seized by the SSS, and that the prosecution authority had had to request them in order to organise the relevant expert examinations. In reply, the prosecution authority simply informed them that the computer and technical (information and technological) expert report concerning T.M.'s mobile telephone was part of the criminal investigation file.

51. In another complaint lodged on 25 July 2018, the applicants criticised the fact that the initial investigative measures had been undertaken by the SSS in breach of the institutional independence requirement, thus prejudicing the whole investigation. They stressed that the applicants' house had been under the exclusive control of the SSS for at least three hours before the search of T.M.'s bedroom had been conducted and that this raised serious doubts as to the origin of the hand grenade in the bedroom. They also complained about the refusal of the prosecution authority to grant the first applicant the procedural status of a victim, in the absence of which they had been arbitrarily refused access to the classified documents in the investigation file. They also alleged that the scope of the investigation was narrow, overlooking, despite their numerous requests, the planning stage of the special operation. As to T.M.'s mobile telephone and headphones, the applicants maintained their

complaint about the absence of those two pieces of evidence from the investigation file. They alleged that in view of the time of the applicant's last mobile telephone communication, it was likely that he had been using his mobile telephone and the headphones at the time of the special operation, and, hence had not heard the SSS officers entering his bedroom. They complained about the failure of the prosecution authority to check the seized mobile telephone for traces of T.M.'s blood, and about the alleged disappearance of the headphones. While referring to other procedural failures, they requested that the prosecution authority fully examine the planning phase of the special operation and conduct an investigation into the allegations of the SSS having tampered with the evidence.

52. In their letters to the prosecution authority of 13 March, 30 July, 11 October and 17 December 2018, the applicants also maintained that the manner in which they had been treated by the SSS officers had amounted to inhuman and degrading treatment within the meaning of Article 144 of the Criminal Code. They requested the initiation of a separate set of proceedings into their allegations of inhuman treatment. In response, in letters of 14 March, 5 August, 22 October and 25 December 2018, the applicants were informed that their allegations were to be examined within the context of the already ongoing criminal investigation. In their letter of 23 May 2019, they contended, among other things, with reference to various expert reports, that at the moment of the shooting T.M. had been in a lying down position, which ruled out, in their view, the possibility of his reaching for a hand grenade and attempting to detonate it. They also complained about the fact that the planning stage of the special operation had been left outside the scope of the ongoing criminal investigation.

53. From the early stages of the investigations the applicants complained to the prosecution authority that the investigation was not being conducted thoroughly and impartially.

F. The discontinuation of the investigation

54. On 25 January 2020 the prosecution authority decided to discontinue the criminal investigation owing to the lack of sufficient grounds for concluding that a criminal offence under the Criminal Code had been committed (Article 105 § 1 (a) of the CCP). Having recapitulated the evidence, the prosecution authority concluded that SAU officer no. 1 had shot T.M. only after the latter had failed to comply with his request to show his hands and had instead tried to activate a hand grenade, thereby posing an immediate risk to his own life and that of others. The decision referred to Article 28 of the Criminal Code, in accordance with which a person acting in self-defence could not be considered as having acted unlawfully. The decision stated that the SAU officer had acted in the honest belief that his own life and physical integrity, and those of his colleagues, had been in

danger because of the threat that T.M. had posed to them. The SAU officer was accordingly entitled to use appropriate means of self-defence. As to the planning and control of the operation, the prosecution authority concluded that the arrest operation had been pre-planned, that a relevant plan had been prepared beforehand, that all those involved in the operation had been properly instructed, and that each group effecting the arrest had been under the command of a responsible officer.

55. The prosecution authority also concluded that the allegations of inhuman and degrading treatment, as made by the applicants in their complaints, had been proven to be unsubstantiated.

56. The decision stated at the end that the victim, if one existed, had a right to lodge a single appeal to a superior prosecutor against the prosecutorial decision to discontinue the investigation. The decision of the superior prosecutor was final and not amenable to a judicial appeal, unless what was at stake was a particularly serious crime, a crime of domestic violence (under Article 126 § 1 of the Criminal Code) or other specific crimes, provided for by law.

IV. DOMESTIC LEGISLATION

A. The State Security Service Act

57. The State Security Service Act provides for the organisation and main guiding principles concerning the operation of the State Security Service in Georgia, and its functions and authority. Under the Act, the State Security Service (*სახელმწიფო უსაფრთხოების სამსახური*) is the national security and intelligence service of Georgia, which operates under the umbrella of the Government of Georgia. Its primary function is to provide for the national security of the State. Its activities in support of national security include combatting terrorism. The relevant provisions of the Act read as follows:

Section 23. Coercive measures

"(1) Coercive measures shall include the use of physical force, special equipment and firearms by authorised divisions and officers of the Service for the purposes determined by this Act.

(2) An officer shall be authorised, for the purpose of performing his or her duties, to proportionately employ a relevant coercive measure only if necessary and to such an extent as to ensure the achievement of a legitimate objective.

(3) An officer shall be authorised to use a firearm and special equipment only if he or she has undergone special training.

(4) An officer shall be obliged to issue a prior warning to a [relevant] person about the use of physical force, special equipment or a firearm and to give him or her a reasonable time for compliance with the lawful order, unless a delay could result in an encroachment on the life and health of the [relevant] person and/or the officer or [could

bring about] other grave results, or if in a given situation it is unjustifiable or impossible to issue such a warning.

(5) The form and extent of a coercive measure shall be determined on the basis of a concrete situation, in view of the nature of the [alleged] offence and the individual characteristics of the [alleged] perpetrator. At the same time, an officer who employs a coercive measure shall aim at causing damage which is minimal and proportionate.

(6) An officer shall provide first aid to a person who has been injured as a result of the application of a coercive measure ..."

Section 26. Right to use firearms

"(1) An officer may keep, carry, and use a service firearm, as well as an additional service firearm as established in the procedure determined by the Head of the Service.

(2) The procedure for an officer to keep and carry firearms shall be determined by the Head of the Service.

(3) Passive use of a firearm refers to the demonstration of a firearm by an officer for achieving a legitimate objective.

(4) Active use of a firearm refers to an intentional shot from a firearm.

(5) An officer may use a firearm as a last resort:

(a) to defend himself or herself and/or others from an actual, direct and immediate threat to their lives and/or health;

...

(d) to prevent a violent crime if a person resists an officer;

...

(6) The active use of a firearm against a person shall be preceded by a verbal warning followed by a warning shot. In case of necessity, a warning shot may not be fired.

(7) A firearm may be used without prior warning:

(a) in the event of an armed attack, or an unexpected attack with military equipment, or any vehicle or mechanical means;

...

(c) in the event of armed resistance by a person;

...

(8) A firearm which may cause deadly injury may be used only in cases of self-defence and/or absolute necessity ..."

B. The Criminal Code

58. The relevant Articles of the Criminal Code read as follows:

Article 28 – Self-defence (აუცილებელი მოგერიება)

"1. A person shall not be considered as having acted unlawfully if he or she commits an act provided for by this Code in self-defence, namely unlawfully inflicting damage to a wrongdoer in order to protect his or her own or another's legal interests.

2. A person shall have the right to self-defence regardless of whether he or she is able to prevent the infringement or seek assistance from another person ..."

Article 30 – Absolute necessity (უკიდურესი აუცილებლობა)

"A person shall not be considered as having acted unlawfully if he or she commits an act provided for by this Code in absolute necessity, namely if he or she causes damage to another person in order to avert danger ..., provided that the danger could not have been avoided by other means and if the harm caused to the damaged interest was of less significance than the saved interest."

Article 331[1] – Financing terrorism and provision of other material support or resources to terrorists' activities

"1. The collection or supply of financial resources or other assets knowing that they will or may be used in full or in part by a terrorist or a terrorist organisation and/or for carrying out terrorist activities, or for the commission of one of the offences defined in Articles 144, 227, 227[1], 227[2], 227[3], 229, 230, 231, 231[1] and 231[2] of this Code, regardless of whether or not any of the offences defined in the above Articles has been committed, and/or knowingly rendering services to a terrorist or a terrorist organisation, or providing a terrorist with a hiding place or shelter and/or resources, or [providing] a terrorist or a terrorist organisation with other material support, –

shall be punished by imprisonment for a term of ten to fifteen years.

2. The same act committed:

(a) by a group of persons with prior agreement;

(b) repeatedly, –

shall be punished by imprisonment for a term of fourteen to seventeen years.

3. An act provided for in paragraph 1 or 2 of this article:

(a) committed by a terrorist organisation;

(b) that results in grave consequences, –

shall be punished by imprisonment for a term of seventeen to twenty years or by life imprisonment."

Article 333 – Misuse of authority

"1. Misuse of authority by a public official ... which substantially adversely affects the rights of a natural person or other legal entity or the legal interests of society or of the State ...

3. An act provided for in paragraph 1 or 2 of this article:

...

(b) committed by resorting to violence or using a weapon;

...

shall be punishable by a term of imprisonment of between five and eight years, and up to three years' disqualification from holding public office ..."

C. The Code of Criminal Procedure

59. The relevant Articles of the CCP, as in force at the material time, read as follows:

Article 3. Definitions ...

"...

22. A victim – a State, physical or legal person, who has suffered pecuniary, non-pecuniary or physical damage directly as a result of a crime."

Article 56. Granting victim status

"1. A victim shall enjoy all the rights of a witness and bear all [related] obligations.

...

5. The decision to grant victim status ... shall be taken by a prosecutor."

Article 57. Rights of a victim

"A victim shall have the right

(a) to be informed about the substance of any charges brought against an accused;

(b) to give evidence in court ... in connection with the damage suffered;

(c) to receive, free of charge, a copy of a decision to terminate a criminal prosecution and/or investigation, a copy of a judgment, or a copy of another interlocutory decision by a court;

...

(g) to request that a prosecutor introduce special protective measures if his or her life, health and/or property or that of his or her family member or a close relative is under threat;

(h) to be informed about his or her rights and duties;

(i) to enjoy other rights provided for by the current Code."

60. Article 105 of the CCP provides for the situations in which criminal proceedings are to be discontinued. Among other grounds, it refers to a situation in which no crime, as provided for by the Criminal Code, had been shown to be committed. Article 106 of the CCP provides that an appeal against a decision terminating an investigation can be lodged with the hierarchical superior of the relevant prosecutor by a person having the procedural status of a victim. The decision of the superior prosecutor is final, except for cases in which the relevant criminal proceedings concerned a particularly serious crime, a crime of domestic violence and/or other specific crimes, as provided for by the CCP. In such a case, a single appeal may be lodged with a court against the prosecutorial decision.

V. RELEVANT INTERNATIONAL DOCUMENTS

A. United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

61. The relevant parts of the above-mentioned principles ("the UN Principles"), which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990, provide as follows:

> "...
>
> 22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.
>
> 23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly."

B. General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life

62. The relevant parts of the above-mentioned General Comment, which was adopted by the UN Human Rights Committee at its 124th session (8 October – 2 November 2018), provide as follows:

> "**II. The Prohibition against Arbitrary Deprivation of Life**
>
> 13. States parties are expected to take all necessary measures intended to prevent arbitrary deprivations of life by their law enforcement officials ... These measures include appropriate legislation controlling the use of lethal force by law enforcement officials, procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life, mandatory reporting, review, and investigation of lethal incidents ...
>
> **III. The Duty to Protect Life**
>
> 28. Investigations into allegations of violation of Article 6 must always be independent, impartial, prompt, thorough, effective, credible, and transparent ... States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred ..."

C. The Minnesota Protocol

63. In 2017, the Office of the UN High Commissioner for Human Rights published a revised version of the Minnesota Protocol on the Investigation of Potentially Unlawful Death ("the Minnesota Protocol"), a set of international guidelines, which provides (footnotes omitted):

> "**iii. Independent and impartial**
>
> 28. Investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence. They must be independent institutionally and formally, as well as in practice and perception, at all stages. Investigations must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong. Investigations of law enforcement killings, for example, must be capable of being carried out free from undue influence that may arise from institutional hierarchies and chains of command. Inquiries into serious human rights violations, such as extrajudicial executions and torture, must be conducted under the jurisdiction of ordinary civilian courts. Investigations must also be free from undue external influence, such as the interests of political parties or powerful social groups.
>
> **iv. Transparent**
>
> 32. Investigative processes and outcomes must be transparent, including through openness to the scrutiny of the general public and of victims' families. Transparency promotes the rule of law and public accountability and enables the efficacy of investigations to be monitored externally. It also enables the victims, defined broadly, to take part in the investigation. States should adopt explicit policies regarding the transparency of investigations. States should, at a minimum, be transparent about the existence of an investigation, the procedures to be followed in an investigation, and an investigation's findings, including their factual and legal basis.
>
> **The participation and protection of family members during an investigation**
>
> 35. The participation of the family members or other close relatives of a deceased or disappeared person is an important element of an effective investigation. The State must enable all close relatives to participate effectively in the investigation, though without compromising its integrity. The relatives of a deceased person must be sought and informed of the investigation. Family members should be granted legal standing, and the investigative mechanisms or authorities should keep them informed of the progress of the investigation, during all its phases, in a timely manner. Family members must be enabled by the investigating authorities to make suggestions and arguments as to what investigative steps are necessary, provide evidence, and assert their interests and rights throughout the process. They should be informed of, and have access to, any hearing relevant to the investigation, and they should be provided with information relevant to the investigation in advance."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

64. The applicants complained that the lethal force used by the security forces against T.M. had been unjustified, disproportionate and excessive, and that the planning and conduct of the operation was not such as to ensure the

protection of T.M.'s right to life. The applicants further alleged that the national authorities had failed to carry out an effective investigation into the circumstances surrounding the security operation and T.M.'s death. They relied on Article 2 of the Convention, which reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Admissibility

1. The parties' submissions

65. The Government submitted that the applicants' complaint under the substantive limb of Article 2 of the Convention was inadmissible as it had not been submitted to the Court within the six-month time-limit. According to them, the applicants had consistently maintained from the very outset of the investigation that it had been inadequate and ineffective. In such circumstances, in view of their lack of trust in the process, they should have been expected to lodge their application with the Court earlier, as soon as they had realised that the investigation into their grievances was ineffective. As an alternative argument, they also submitted that the application was premature as at the time that it was lodged with the Court, the relevant criminal proceedings were still ongoing.

66. As regards the complaint under the procedural limb of Article 2, the Government submitted that it was manifestly ill-founded as the investigation had satisfied the requirements of independence, thoroughness, and effectiveness.

67. The applicants contested the Government's objections. They started by arguing that the Government had failed to specify the starting point for the calculation of the six-month time-period in the present case. With reference to the relevant Georgian case-law, they further argued that a criminal complaint aimed at holding State agents criminally liable for their allegedly unlawful acts was an effective remedy to be made use of, and that they should not have been reproached for availing themselves of that opportunity. They had displayed sufficient diligence and interest *vis-à-vis* the ongoing proceedings, lodging procedural requests and requests for information over a period of more than fourteen months. According to the applicants, it was the repeated refusal by the prosecution authorities to grant them victim status,

confirmed by a domestic court, which made it obvious that a further wait was futile.

2. The Court's assessment

68. The Court notes that the present application, which primarily concerns the manner in which the special operation of 26 December 2017 was conducted, was lodged with the Court on 6 June 2019. The relevant criminal proceedings started in the immediate aftermath of the operation and were completed within a little over two years, on 25 January 2020. What is at stake, accordingly, is a promptly initiated investigation, conducted with reasonable expedition, without any major periods of inactivity. Notwithstanding their doubts concerning the adequacy of the investigation, the case file shows that the applicants maintained regular contact with the prosecution authorities, submitted various procedural requests aimed at obtaining new and detailed evidence, and took steps to inform themselves of the status of their complaints and to speed up their examination, in the hope of a more effective outcome (see paragraphs 45, 48-52 above). The Court considers that they acted diligently and promptly throughout the whole investigation process without showing, at any stage, any loss of interest in the proceedings (contrast *Cerf v. Turkey*, no. 12938/07, §§ 62-64, 3 May 2016; see *Manukyan v. Georgia* (dec.), no. 53073/07, § 30, 9 October 2012; and *Akhvlediani and Others v. Georgia* (dec.), no. 22026/10, § 25, 9 April 2013).

69. Against this background, the Court is not convinced by the Government's claim that the six-month time-limit ought to have been calculated from the early stages of the investigation. It refers in this connection to its well-established case-law under which a separate criminal complaint with the aim of holding State agents responsible for alleged acts of unlawful use of force is, in the normal course of events, an effective remedy which must be made use of (see *Fountas v. Greece*, no. 50283/13, § 52, 3 October 2019, with further references; see also *Kerimova and Others v. Russia*, nos. 17170/04 and 5 others, § 215, 3 May 2011, and *Aprasidze and Others v. Georgia* (dec.), no. 32220/07, § 24, 21 May 2013), and even if there are some doubts from the very beginning as to the effectiveness of this remedy, an applicant must not be reproached for attempting to make use of it before lodging a complaint with the Court, in view of the principle of subsidiarity (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 141, ECHR 2012; see also *Akdivar and Others v. Turkey*, 16 September 1996, § 71, *Reports of Judgments and Decisions* 1996-IV). The Court considers the applicants' explanation concerning the triggering point for their calculation of the six-month time-period in the present case, in particular the refusal to grant the first applicant victim status in the ongoing criminal proceedings, to be fully acceptable (see, for example, *Shavlokhova v. Georgia* (dec.), no. 4800/10,

§§ 23-24, 18 September 2019). They cannot, hence, be criticised for not having lodged their application with the Court earlier.

70. The Court also notes that it has previously accepted that the last stage of a particular remedy may be reached after the application has been lodged but before its admissibility has been determined, as is the situation in the present case (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, ECHR 2011 (extracts), and *Şahin Alpay v. Turkey*, no. 16538/17, § 86, 20 March 2018). With this reasoning in mind the Court has recently dismissed an objection by the Polish Government regarding non-exhaustion of domestic remedies, on the basis of the fact that the final decision in the criminal proceedings was delivered before the Court had decided on the admissibility of the application (see *Jabłońska v. Poland*, no. 24913/15, § 51, 14 May 2020). Hence, the Government's argument concerning the premature nature of the application is also to be dismissed.

71. As to the claim that the procedural complaint under Article 2 of the Convention is manifestly ill-founded, the Court considers that the question of whether the relevant authorities failed to conduct an effective investigation into the circumstances in which T.M was wounded is, in the circumstances of the present case, to be assessed on the merits of their complaint under that provision. The Court, therefore, concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

The parties' submissions

(a) The applicants' submissions

72. The applicants submitted, as far as the domestic legal framework was concerned, that the relevant national provisions concerning the use of firearms by law-enforcement agencies failed to incorporate the test of "absolute necessity"; that the test for self-defence under domestic law was lower than the standard required by Article 2 of the Convention; and that there were no detailed rules designed specifically to regulate the use of lethal force.

73. As to the planning of the operation, the applicants claimed that it had been carried out on the basis of the CCP. There was no reference whatsoever in the relevant domestic court decision to the Combating Terrorism Act which provided a separate legal regime for counterterrorist operations. Moreover, according to the applicants, the SSS, the authority in charge of the operation, had had three full days to prepare and plan it; it was in control of the situation at all stages of the operation; and it had not been facing a hostage crisis. In such circumstances, according to the applicants, the Government's argument of "political choices" was inappropriate as the SSS was simply handling a

routine police operation involving highly trained special forces officers (see paragraph 78 below). The applicants dismissed in this connection the Government's reliance on the Court's case-law concerning large-scale counterterrorist operations in the North Caucasus as irrelevant (see ibid.). While Chatayev and his group had posed a security threat to Georgia, however serious that threat might be, their terrorist activity in Georgia had manifested itself only in one, isolated and localised incident. Moreover, the special operation of 26 December 2017 had concerned the arrest of five individuals, who were suspected of providing limited material support to alleged terrorists, without any evidence of a substantial terrorist affiliation. The applicants also submitted that the Government had failed to provide the Court with any contemporaneous documents concerning the actual planning of the operation, including any instructions issued to the officers involved, and had relied instead on the statements of individual SSS officers.

74. As to the fatal shooting itself, the applicants maintained that the Government had failed to show that the use of force in question had been absolutely necessary in the circumstances of the present case. The applicants submitted that it had not been proved in a convincing manner by the investigation that T.M. had been holding a hand grenade when the SAU officers had entered his bedroom. The SAU officers had mishandled the process of seizing, examining and testing the hand grenade. They had also failed to provide satisfactory explanations concerning issues such as T.M.'s exact position at the moment the officers had entered his bedroom; the sequence of events before and during the shooting, including the assumption that the applicant had had his mobile telephone and headphones with him; and the question of issuing a warning to T.M.

75. As to the procedural aspect of their complaint, the applicants pointed out a number of specific shortcomings in the investigation. In particular, they submitted that the scope of the investigation had been narrow, leaving the planning stage of the operation unexamined; the authorities in charge had not been sufficiently independent; the responsible authorities had failed to secure the incident scene, failing thus to prevent the contamination of potential evidence; certain pieces of evidence had been lost, including the headphones that, the applicants alleged, T.M. had been using when the two SAU officers had entered his room; the SSS had planted the hand grenade to justify the shooting; the alleged hand grenade had been seized and kept by an authority which was not impartial and independent for the purposes of the investigation, and had eventually been destroyed; there had been flaws in handling the firearm used in the shooting and the bullet case; a number of investigative actions were conducted with substantial delay, including the interviewing of the SAU officers; and the applicants' participation in the proceedings had been limited. In the latter respect, the applicants submitted that the refusal of the prosecution authorities to grant the first applicant the procedural status of a victim had been arbitrary; that as a result the applicants

had been prevented from participating effectively in the investigation, as their involvement had been dependent on the "goodwill" of the prosecution authorities; that their access to the classified materials in the investigation file had been substantially delayed; and that in view of the absence of their having a procedural status in the investigation, they had been deprived of the ability to challenge before the domestic courts the prosecutorial decision to discontinue the criminal investigation. The applicants had consistently complained about the above and other procedural flaws in their complaints of 18 and 26 January, 26 February, 18 May, 3 and 25 July and 17 December 2018 to the investigative authority, but to no avail.

(b) The Government's submissions

76. With regard to the relevant legal framework on the use of lethal force, the Government argued that the test of "absolute necessity" was duly incorporated into sections 23 and 26 of the State Security Service Act, read in conjunction with Articles 28 and 30 of the Criminal Code (as cited in paragraphs 57-58 above). They maintained that it was on the basis of those provisions that the SAU officers had used lethal force during the operation for the arrest of T.M. They argued that in accordance with section 23 of the State Security Service Act, the test of "absolute necessity" was a precondition for using force during special operations. Section 26(5) of the State Security Service Act explicitly stated that the use of a firearm was allowed only as a last resort and section 26(8) additionally stated that the use of a firearm, if it might cause deadly injury, was allowed only in cases of self-defence and/or absolute necessity. Thus, according to the Government, State agents when choosing to use a coercive measure were expected to follow the following criteria: (i) the coercive measure should be necessary; (ii) the chosen measure should cause minimal and proportionate damage; and (iii) the coercive measure should not exceed what is sufficient to achieve a particular legitimate objective. As an alternative argument, the Government submitted, with reference to *Erdoğan and Others v. Turkey* (no. 19807/92, § 77, 25 April 2006), that even if there was a difference between the relevant national standards and those implicit under Article 2 § 2 of the Convention, it was not sufficiently great to amount to a violation of Article 2 in and of itself (the Government also referred to *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, § 230, 20 December 2011).

77. The Government further argued that members of the special forces were trained to use firearms. They knew about their obligations to choose weapons in a manner that would cause minimal damage, to provide emergency medical assistance if needed, and to give an advance verbal warning and fire a warning shot.

78. As regards the planning of the special operation, the Government submitted that the operation had been planned with a view to arresting all five suspects simultaneously at their respective addresses. It was decided to

conduct the operation at night in order to minimise any risks of clashes with the local population and to avoid any other complications. The fact that the other four suspects were arrested without any resistance and/or incident, was indicative, in the Government's view, of the adequate planning of the operation. They contended that in the context of the fight against terrorism they had to make political choices, which implied that the "absolute necessity" test embodied in Article 2 was bound to be applied with a different degree of scrutiny, depending on whether and to what extent the authorities were in control of the situation and on other relevant constraints inherent in operational decision-making in this sensitive sphere (the Government referred to *Erdoğan and Others*, cited above, § 76, and *Finogenov and Others*, cited above, §§ 210-16). They submitted in this connection that in view of T.M.'s affiliation with Chatayev's terrorist group, the SSS had acted on the assumption that armed resistance was to be expected from T.M. In support of their arguments concerning the planning of the operation, the Government submitted statements from those who had participated in the special operation and who had planned and controlled its conduct. As to the objective of the operation, the Government reiterated that the order had been to arrest the suspects without endangering their lives or health. The SAU members had been briefed orally before the start of the operation and the main points concerning the operation had been written on a whiteboard and then deleted. While no ambulance had been provided, the authorities had organised for the SSS medical staff to be on the ground.

79. As regards the shooting, the Government maintained, with reference to the results of the investigation, that the shot had been preceded by a verbal warning, which T.M. had disregarded. They dismissed the applicants' allegations concerning the absence of a warning as untrue, noting that three out of the four applicants had been sleeping on the ground floor at the relevant time, a fact which had prevented them from hearing the warning. As to the third applicant, they noted the discrepancies between her statements as regards the immediate circumstances of the shooting.

80. The Government further argued that the investigation had been effective and in compliance with the Convention requirements. A comprehensive inquiry had been conducted into various versions of the events, including into the possibility of the unlawful use of force. The Government stressed that every person who had been involved in the events, including all the SAU officers and the applicants, had been interviewed several times, and multiple forensic expert reports had been ordered and produced. The investigation had concluded that the death of T.M. was the result of a legitimate use of a firearm by an SSS officer acting in self-defence. The Government dismissed as unsubstantiated the applicant's allegations concerning tampering with the evidence by the SSS. They also challenged as untrue the allegation that the hand grenade had been planted by the SSS

officers. In support of their arguments, the Government submitted a copy of the whole investigation file.

81. They further submitted that the investigation had been independent as it had started in the Kakheti Regional Prosecutor's Office and had been taken over by the Tbilisi Prosecutor's Office, without any involvement of the SSS. While certain material evidence, including the hand grenade, had been seized by the SSS officers, that was because of the fact that the SSS had been conducting a terrorism-related investigation of its own. They had simply ordered its biological, ballistics, and dactyloscopic examination within the scope of that terrorism-related investigation.

82. As to the applicants' participation in the investigation, the Government submitted that, even in the absence of having a procedural status in the proceedings, they had been sufficiently involved to meet the requirements of "public scrutiny" as provided in the Court's case-law. They had been allowed to regularly consult the case file, many of their requests for the conduct of specific investigative actions had been met, and they had been kept informed about the progress of the investigation (see in this connection paragraph 49 above).

C. The Court's assessment

83. The Court notes that it is uncontested between the parties that the death of the applicants' relative resulted from the use of force by the special forces. The matters in dispute are whether the use of force against him was justified in the circumstances and whether the investigation was effective. The Court considers it appropriate to start its examination of the merits of the applicants' complaint by first addressing the complaint that the domestic investigation into the death of T.M. was inadequate, and then turning to the question of whether the State can be held responsible for his death.

1. Alleged violation of Article 2 in its procedural aspect

(a) General principles

84. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 169, 14 April 2015). The specific requirements of the duty to investigate can be found in *Mustafa Tunç and Fecire Tunç* (cited above, §§ 169-82; see also *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 298-306, ECHR 2011 (extracts), and *Mazepa and Others v. Russia*, no. 15086/07, §§ 69-70, 17 July 2018). In summary,

compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are interrelated and each of them, taken separately, does not amount to an end in itself. Rather, they are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues must be assessed (see *Mustafa Tunç and Fecire Tunç*, cited above, § 225).

85. The persons responsible for an investigation should be independent of anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection, but also a practical independence (see, for example, *Giuliani and Gaggio*, § 300, and *Mustafa Tunç and Fecire Tunç*, § 177, both cited above). What is at stake here is nothing less than public confidence in the State's monopoly on the use of force (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 106, 4 May 2001; *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 325, ECHR 2007-II; and *Giuliani and Gaggio*, cited above, § 300).

86. Moreover, an investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case (see *Hugh Jordan*, cited above, § 109). The requisite access of the public or the victim's relatives may, however, be provided for in other stages of the procedure (see, among other authorities, *Giuliani and Gaggio*, cited above, § 304, and *McKerr v. the United Kingdom*, no. 28883/95, § 129, ECHR 2001-III).

(b) Application of the above principles to the present case

(i) Independence of the investigation

87. Starting with the applicants' allegation that the investigation lacked independence, the Court notes that the prosecution authority started the investigation into the circumstances of the special operation on the very same day as it took place, without any delay (see paragraph 14 above). However, the very first investigative measures, in the immediate aftermath of the special operation, were carried out by an investigator of the SSS and not by the prosecution authority. Thus, the search of T.M.'s bedroom was conducted by the SSS investigator and an important piece of evidence, a hand grenade, was seized by him (see paragraph 11 above). The Court finds relevant the Government's argument that the above-mentioned investigative actions were conducted within the scope of another, terrorism-related, investigation. At the same time, as already noted in different, albeit comparable contexts, in view of their importance, the initial investigative steps have to be assessed with reference to the requirements of independence and impartiality, and

procedural deficiencies in that regard risk tainting all of the subsequent developments in the investigation (see *Tsintsabadze v. Georgia*, no. 35403/06, § 79, 15 February 2011, and *Shavadze*, cited above, § 35; see also *Enukidze and Girgvliani v. Georgia*, no. 25091/07, §§ 245-49, 26 April 2011; *Vazagashvili and Shanava v. Georgia*, no. 50375/07, § 87, 18 July 2019; and *Kukhalashvili and Others v. Georgia*, nos. 8938/07 and 41891/07, § 132, 2 April 2020, with further references).

88. Although the prosecution authority took charge of the investigation on the very same day, within a few hours of the shooting incident, they relied subsequently on, among other things, the results of the investigative measures previously conducted by the SSS investigator, notably, the results of the search of T.M.'s bedroom and the evidence collected as a result. The SSS investigator cannot be regarded as disclosing the requisite independence *vis-à-vis* the SAU officers (see, for instance, *Vazagashvili and Shanava*, cited above, § 87, and *Kukhalashvili and Others*, cited above, § 132 *in fine*; see also *Brecknell v. the United Kingdom*, no. 32457/04, §§ 76 and 82, 27 November 2007). The applicants complained of this fact from the very outset of the investigation, submitting that the examination of the scene of the shooting by the SSS had compromised the integrity of the investigation (contrast *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 242, 30 March 2016). What has to be determined now is whether the above circumstance compromised the investigation's effectiveness and its ability to shed light on the circumstances of the arrest operation and the shooting (see *Mustafa Tunç and Fecire Tunç*, cited above, § 224; *Bektaş and Özalp v. Turkey*, no. 10036/03, § 66, 20 April 2010; and *Cangöz and Others v. Turkey*, no. 7469/06, § 126, 26 April 2016).

(ii) Adequacy of the investigation

89. The Court reiterates that where a suspicious death has been inflicted at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation (see *Enukidze and Girgvliani*, cited above, § 277, and *Armani Da Silva*, cited above, § 234). As already noted above, an investigation in the present case was opened immediately. In the months that followed, the prosecution authority took multiple measures to collect and secure evidence relating to the circumstances in which T.M. was wounded. Nearly all of the people involved in the events and other potential witnesses were interviewed, including the applicants (see paragraphs 16-20 above), the SAU officers who had participated in the special operation as well as those who had planned and controlled its conduct (see paragraphs 21-32 above), and the medical personnel who had been involved in T.M.'s treatment before he passed away (see paragraph 40 above). The prosecution authority also obtained multiple items of forensic and other evidence relating to the incident (see paragraphs 34-39).

90. The applicants complained that the investigation was narrow, confined to the matters directly causative of T.M.'s wounding and subsequent death. The Court notes that the first time those involved in the planning and control of the operation were interviewed was some twenty months after the commencement of the investigation (see paragraphs 29-31 above). This shortcoming was offset in part at a later stage, albeit at the persistent requests of the applicants, with the head and deputy head of the Counter-Terrorism Department and the deputy head of the SSS being interviewed (ibid.). The SAU officers were also reinterviewed in connection with the specific instructions given before the operation (see paragraph 25 above). Hence, the planning and control of the operation had not been left outside the scope of the investigation. The Court cannot but note, however, that no formal reports of the SSS concerning the manner in which the operation was prepared and/or in which it unfolded and no documents or files providing for the procedures that the SAU employed before, during, and after the operation were made available to the prosecution authority during the investigation (see paragraphs 21 and 33 above). In their absence the Court considers that the latter authority was limited in carrying out its assessment of the planning and control phase of the operation (see *Jaloud v. the Netherlands* [GC], no. 47708/08, § 203, ECHR 2014).

91. As regards other procedural failings alleged by the applicants, the Court notes that the search of T.M.'s bedroom, as already concluded above, was conducted by an SSS investigator whose independence *vis-à-vis* the SAU officers was not sufficient (see paragraph 87 above). After the search, the site was not secured, and its original state not preserved (see paragraph 12 above; compare *Tsintsabadze,* cited above, § 79, and *Yukhymovych v. Ukraine*, no. 11464/12, § 68, 17 December 2020). In the context of violent crimes, the Court has repeatedly reiterated that the examination of the crime scene and preservation of forensic evidence constitute one of the basic requirements of an effective investigation (see *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 511, 13 April 2017). In the circumstances of the present case this failure had concrete implications for the investigation. For example, the location of T.M.'s mobile telephone at the moment of the shooting could not be confirmed; the origin of the traces of blood allegedly found on it could not be properly established, and the allegations concerning T.M.'s headphones could not be fully verified. Another of the applicants' concerns related to the manner in which the hand grenade was treated. It was moved by SAU officer no. 1 from T.M.'s bed onto the floor in order to enable access to T.M. to provide him with medical assistance. The Court accepts that the need to provide first aid to a seriously injured individual should take precedence over the requirement to avoid disturbing the scene of an incident (see *Mustafa Tunç and Fecire Tunç*, cited above, § 194). Subsequently, the hand grenade was neutralised by two other officers (see paragraph 26 above) and seized by the SSS.

92. As to the evidence of the SAU officers, the Court notes the Government's argument that they were first interviewed with almost a five-week delay because their identity was classified, and the relevant declassification procedure required a certain amount of time. While this is relevant, the Court cannot accept such an argument. Such a delay could not be justified in the circumstances of the present case, particularly having regard to the importance of the officers' evidence, as there were no independent eyewitnesses to the fatal shooting (see *Ramsahai and Others v. the Netherlands* ([GC], no. 52391/99, § 331, ECHR 2007-II). The Court reiterates in this connection its reasoning in *Ramsahai and Others* (ibid., § 330) and *Bektaş and Özalp* (cited above, § 65), where it established that a delay of three days and seven days, respectively, in the questioning of police officers involved in a shooting constituted a significant shortcoming in the adequacy of the investigation (see also *Jaloud,* cited above, §§ 207-208, and *Ayvazyan v. Armenia*, no. 56717/08, § 80, 1 June 2017). The lengthy delay in interviewing the officers in the present case created, in the Court's view, the risk of their colluding with each other and the Government did not suggest that any precautions had been taken to reduce the risk of such collusion. The delay also created the risk of undermining, in view of the passage of time, the officers' capacity to recall the details of the special operation in a meticulous manner (see, *mutatis mutandis, M.B. and Others v. Slovakia,* no. 45322/17, § 82, 1 April 2021). In this connection, the Court cannot but note that the investigation materials do not contain any written documents or notes filed by any of the SAU members reporting on the operation in its immediate aftermath. Also, the failure to promptly interview the SSS officers could have led the applicants and the public in general to believe that members of the security forces operated in a vacuum and thus were not accountable to the judicial authorities for their actions (see *Bektaş and Özalp,* cited above, § 65). The Court accordingly considers that the delay in the interviewing of the SAU officers amounted to a shortcoming in the adequacy of the investigation.

(iii) Involvement of the applicants in the investigation

93. As to the applicants' complaint concerning their limited involvement in the investigation, the Court reiterates that Article 2 does not require applicants to have access to police files, or copies of all documents during an ongoing inquiry, or that they be consulted or informed about every step. The disclosure or publication of police reports and investigative material may involve sensitive issues, with possible prejudicial effects on private individuals or other investigations; such disclosure or publication therefore cannot be regarded as constituting an automatic requirement under Article 2 (see *Fountas*, cited above, § 71). Similarly, the investigative authorities cannot be required to indulge every wish of a relative as regards investigative measures (see *Ramsahai and Others*, cited above, § 348). However, the Court must examine whether the applicants were afforded access to the

investigation to the extent necessary to safeguard their legitimate interests (see *Gürtekin and Others and two other applications v. Cyprus,* nos. 60441/13, 68206/13, and 68667/13, § 29, 11 March 2014; see also *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, § 273, 4 April 2017, with further references therein).

94. The Court notes that in the present case the applicants, via their legal representative, had regular access to the investigation file. Some of their requests for the conduct of additional investigative measures were also granted (see paragraph 49 above). Hence, they were allowed to participate in the conduct of the re-enactment scene. Also, the interviewing of the head and deputy head of the Counter-Terrorism Department and the deputy head of the SSS, and the additional interviewing of the SSS officers, were organised at their request (ibid.). The applicants complained that their access to the classified interviews of the SAU officers was delayed. As the Court has repeatedly noted, even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests (see *Al Nashiri v. Poland*, no. 28761/11, § 494-95, 24 July 2014, and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 488-89, 24 July 2014, both judgments with further references to the Court's case-law). In the present case the applicants were not allowed access to the classified information, in particular the interviews of the SAU officers until January 2020, that is several days before the discontinuation of the proceedings. That delay of two years limited the applicants' ability to participate effectively in the investigation, as they were not allowed to familiarise themselves with the only direct evidence concerning the planning and the execution phase of the operation. The failure to give the applicants access to the relevant interviews on time appears all the more substantial as the official version of the events as confirmed by the prosecution authority significantly relied on the evidence of the SAU officers. The relevant authorities did not argue that the declassification of the interviews was a laborious process involving several different authorities (see *Fountas*, cited above, § 94). According to the case file, only the identities of the officers were concealed.

95. As regards the prosecution authority's persistent refusal to grant the first applicant the procedural status of a victim, the Government claimed that the applicants were allowed to exercise many of the procedural rights even in the absence of that procedural standing. While it is true that the applicants were given access to the investigation file and were also granted a number of procedural requests (see paragraph 49 above), the Court cannot overlook the fact that the applicants were unable, on account of not having been granted

the procedural status of a victim, to appeal against the prosecutorial decision to discontinue the criminal investigation. The Court observes that this issue has already been noted in previous cases against Georgia (see *Edzgveradze v. Georgia*, no. 59333/16, § 46, 20 January 2022, with further references therein; see also, *Kukhalashvili and Others*, cited above, § 134; *Shavadze*, cited above, § 35; *Women's Initiatives Supporting Group and Others v. Georgia*, nos. 73204/13 and 74959/13, § 65, 16 December 2021; and *A and B v. Georgia*, no. 73975/16, § 44, 10 February 2022).

96. The Court notes that where there has been no unlawfulness or flagrant shortcoming which could lead the Court to find that the investigation was flawed, the Court would exceed the limits of its jurisdiction were it to interpret Article 2 as imposing a requirement on the authorities to put in place a judicial remedy (see *Mustafa Tunç and Fecire* Tunç, cited above, § 232, with further references therein). In *Armani Da Silva* (cited above, § 279), the Court, having analysed relevant information from various member States, concluded that there was no uniform approach among member States with regard either to the availability of review or, if available, the scope of that review. Where such a review of investigative decisions exists, however, they are doubtless a reassuring safeguard of accountability and transparency (see *Mustafa Tunç and Fecire* Tunç, § 233, and *Gürtekin and Others*, § 28, both cited above). In the present case there was a right to have prosecutorial decisions judicially reviewed by an independent court (see paragraph 60 above). Such a possibility was not, however, accessible to the applicants, in view of their lack of victim status (compare *Jaloud*, cited above, § 224; contrast *Giuliani and Gaggio*, cited above, § 313). The Court, hence, considers that the decision to refuse the first applicant victim status prevented the applicants from exercising an important procedural safeguard provided for by law (see *Edzgveradze,* cited above, § 46).

(iv) Conclusion

97. In conclusion, having regard to the deficiencies in the proceedings identified above, particularly the defective initial investigative response, including the way in which important evidence was gathered and handled, the superficial examination of the planning and control phase of the operation, the delay in interviewing the SSS officers, and the denial of victim status to the first applicant, which prevented the applicants from appealing against the decision of the prosecutor's office – the Court considers that the authorities have failed to comply with the requirements of an effective and thorough investigation for the purposes of Article 2 of the Convention. There has, accordingly, been a violation of Article 2 of the Convention under its procedural limb.

2. Alleged violation of Article 2 in its substantive aspect

(a) General principles

98. A summary of the applicable general principles can be found in *Giuliani and Gaggio* (cited above, §§174-82, 208-10 and 249-50; see also *Cangöz and Others*, cited above, §§ 105-06, and *Yukhymovych*, cited above, §§ 60-62). The Court reiterates that Article 2 safeguards the right to life and sets out the circumstances where deprivation of life may be justified. The situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted. The use of force which may result in the deprivation of life must be no more than "absolutely necessary" and must be strictly proportionate to the achievement of one of the purposes set out in Article 2 § 2 (a), (b) and (c) (see *Oğur v. Turkey* [GC], no. 21594/93, § 78, ECHR 1999-III). In cases concerning the use of force by State agents, it must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination. As the text of Article 2 § 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. However, any use of force must be "no more than absolutely necessary", that is to say it must be strictly proportionate in the circumstances. In view of the fundamental nature of the right to life, the circumstances in which deprivation of life may be justified must be strictly construed (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 150 and 194, Series A no. 324; *Bubbins v. the United Kingdom*, no. 50196/99, §§ 135-36, ECHR 2005-II (extracts); *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 93-94, ECHR 2005-VII; see also *Makaratzis v. Greece* [GC], no. 50385/99, §§ 56-59, ECHR 2004-XI).

99. In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards (see *Makaratzis*, cited above, §§ 57-59).

(b) Application of the above principles to the circumstances of the present case

100. Starting with the relevant legal framework, the Court notes that the circumstances in which SSS officers may use firearms are strictly regulated by national legislation. For example, in accordance with section 26 of the State Security Service Act, firearms may only be used in self-defence or in cases of absolute necessity. The use of firearms also depends on an assessment of the surrounding circumstances (see paragraph 57 above). The Court, therefore, considers, having regard to parties' submissions and in the

light of the relevant international standards, that the State Security Service Act, as in force at the material time, put in place an appropriate legal framework governing the use of lethal force (see in this connection *Giuliani and Gaggio*, cited above, §§ 213-15).

101. As regards the planning and control phase of the operation from the standpoint of Article 2 of the Convention, the Court must have particular regard to the context in which the operation was conducted as well as to the way in which it unfolded. It notes in this connection that the operation was planned and conducted within the context of a terrorism-related investigation (see paragraph 5 above). At the same time, the SSS had some time at their disposal to plan the arrest operation, as the court decision authorising the arrest was adopted on 23 December 2017, and the operation took place on 26 December 2017. Thus, the SSS were not dealing with an unplanned and spontaneous operation *per se* (contrast *Makaratzis*, cited above, § 69; see also, *Rehbock v. Slovenia*, no. 29462/95, §§ 71-72, ECHR 2000-XII, and *Celniku v. Greece*, no. 21449/04, § 56, 5 July 2007). Also, the operation was not aimed at averting a terrorist act from happening (contrast *McCann and Others*, cited above, § 195).

102. The Court notes that the Government failed to submit any documents or files providing for the procedures that the SAU employed before, during, and after the operation in question (see paragraphs 21 and 33 above). Formal reports concerning the manner in which the operation was prepared and/or in which it unfolded are also missing from the investigation file and the Government provided no explanation in this regard (see, in this connection, *Yukhymovych*, § 77, and *Erdoğan and Others*, § 75, both cited above). Nonetheless, there is nothing to suggest that the SAU officers were not intending to carry out an arrest, as per the stated purpose of the operation. Moreover, the Court accepts the Government's argument that the SSS were expecting armed resistance from T.M., particularly in view of how the operation of 21-22 November 2017 had unfolded (see paragraph 6 above).

103. The Court also notes that in planning an operation involving a large number of armed officers and aimed at arresting, according to the official version of events, a potentially armed terrorist, the SSS Counter-Terrorism Department failed to arrange for an ambulance to be present (see *Wasilewska and Kałucka v. Poland*, nos. 28975/04 and 33406/04, § 55 *in fine*, 23 February 2010). In consequence, T.M.'s transportation to a hospital and his provision with artificial respiration was delayed (see paragraph 39 above). Nevertheless, as it appears from the case file, T.M. was provided with first aid medical assistance by the SSS medical staff immediately after the fatal shot (see paragraph 10 above) and was then transported to the ambulance (see paragraph 40 above). Also, the delay in his hospitalisation had no causal link with his death (see paragraph 39 above).

104. The Court considers that the situation in the present case cannot be equated to a death in custody or to other situations where the authorities were

in control, with the result that the burden of proof may be regarded as resting on the State (see *McKerr*, cited above, § 119; *Shanaghan v. the United Kingdom*, no. 37715/97, § 97, 4 May 2001; *Kelly and Others v. the United Kingdom*, no. 30054/96, § 103, 4 May 2001; and *McShane v. the United Kingdom*, no. 43290/98, §§ 103-04, 28 May 2002). As it appears, the crucial question in the present case is related to the behaviour of T.M. at the moment when the officers entered his bedroom. While the investigation concluded that the first SAU officer had reacted to T.M. reaching for a hand grenade and had, believing that he was in immediate danger, fired a shot directly at his head, the applicants claimed that T.M. had most likely been using his mobile phone at that moment. The Court notes that a hand grenade with blood stains which corresponded to the genetic profile of T.M. was seized from the latter's bedroom (see paragraph 34 above) and that it cannot be said that the authorities failed to provide a plausible explanation for the events leading to the death of T.M. (compare and contrast *Abdulkhanov v. Russia*, no. 35012/10, §§ 97-98, 6 July 2021, and *Khayauri and Others v. Russia*, nos. 33862/17 and 2 others, § 82, 19 October 2021). In such circumstances, the Court considers that the evidence before it renders impossible the assessment of the above conflicting versions, irrespective of the fact that this derives, at least in part, from the shortcomings of the investigation. While it is undisputed that T.M. died as a result of the fatal wound he received in the course of the security operation for his arrest, no judicial assessment of the exact circumstances which led to the firing of the fatal shot was conducted at the domestic level (contrast *Gülen v. Turkey*, no. 28226/02, § 29, 14 October 2008).

105. The Court reiterates, in this connection, that, detached from the events in issue, it has no sound basis on which to assess the situation in which the officer, who was required to react in the heat of the moment, found himself or to find that T.M. was under the control of the SAU officers at the moment when they entered the room. The Court has repeatedly stated that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Giuliani and Gaggio*, cited above, § 180, and *Mustafa Tunç and Fecire Tunç*, cited above, § 182). Moreover, errors of judgment or mistaken assessments, unfortunate in retrospect, will not *per se* entail responsibility under Article 2 of the Convention (see, among other authorities, *Tagayeva and Others,* cited above, § 609, and *Brady v. the United Kingdom* (dec.), no. 55151/00, 3 April 2001).

106. To sum up, T.M. was fatally injured during a special operation, when SAU officers were trying, according to the plausible version of events provided by the authorities, to disarm him and obtain control over his person, and there is insufficient evidence on which to conclude, beyond reasonable doubt, that T.M. died in circumstances engaging the responsibility of the State (see *Cadıroğlu v. Turkey*, no. 15762/10, § 26, 3 September 2013, and

Ayvazyan, cited above, §§ 91-92). In the specific circumstances of the present case, the Court, accordingly, does not find a violation of Article 2 of the Convention under its substantive limb.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

107. The applicants complained under Article 3 of the Convention that they had been subjected to inhuman and degrading treatment, particularly on account of the aggressive and degrading manner in which the special operation was conducted in their presence. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Admissibility

1. The parties' submissions

108. The Government reiterated their plea of inadmissibility on the grounds that the application had been lodged out of time, or in the alternative, that it was premature (see paragraph 65 above) in connection with the applicants' complaint under Article 3 of the Convention. They additionally contended, noting that the applicants had first voiced their grievances concerning alleged ill-treatment three months into the investigation, that it had been lodged in disregard of the due diligence requirement to act promptly.

109. The applicants submitted that, in view of their vulnerability, and given the psychological effects of the traumatic experience that they had endured during the special operation, the delay of three months in voicing their grievances concerning the alleged ill-treatment was not that lengthy.

2. The Court's assessment

110. The Court observes that the Government raised several admissibility objections in relation to the applicants' complaint under Article 3 of the Convention. It, however, finds it unnecessary to consider them separately, as the applicants' relevant complaint is in any event inadmissible as being manifestly ill-founded.

111. The operation in the present case pursued the legitimate aim of carrying out an arrest of T.M. and the search of his house. Although the four applicants were not physically injured in the course of the special operation in question, it necessarily entailed a degree of physical force. In view of the case materials and the parties' submissions, the Court considers that the only issue it has to address is whether the treatment to which the applicants were subjected during the operation amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention. It reiterates in this

connection its judgment in *Gutsanovi v. Bulgaria* (no. 34529/10, § 132, ECHR 2013 (extracts)), where it held that it cannot go so far as to require law-enforcement agencies not to arrest persons suspected of criminal offences in their homes whenever their children or spouses are present.

112. The Court notes at the outset that, in view of the circumstances of the present case, there is no reason to question the reasonableness and the operational necessity of conducting the special operation at night with the participation of thirty-two armed and masked officers (see, for example, *Ribcheva and Others v. Bulgaria*, nos. 37801/16 and 2 others, § 170, 30 March 2021). There were no children in the house, although T.M.'s grandmother could still be considered particularly vulnerable in view of her age. As regards the psychological effects, the Court observes that police operations which entail intervention in the home and the use of firearms inevitably give rise to negative emotions in the persons involved (see *Gutsanovi*, cited above, § 134). Thus, the four applicants were severely affected by the events. However, there is no evidence in the case file that their stress and anxiety went beyond what could have been expected in that type of law-enforcement operation, particularly given how the operation unfolded. The Court also notes that in their initial statements all four applicants explicitly noted that they had not endured any physical or psychological abuse by the SAU officers (see paragraphs 16-19 above). Moreover, the first applicant rejected the suggestion that he should undergo a medical examination (see paragraph 19 above). In such circumstances the Court considers that there is insufficient evidence to conclude that the operation was aimed at instilling fear in the applicants and/or subjecting them to degrading treatment.

113. The Court thus concludes, having regard to the nature of the applicants' allegations, the delay with which they voiced these allegations, and the evidence in the case file, that the applicants' complaint under Article 3 of the Convention is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

114. Lastly, the applicants complained that they had not had the benefit of an investigation that conformed to the procedural requirements arising out of Article 13 of the Convention. In view of its findings above (see paragraphs 97-113 above), the Court is of the opinion that there is no need to examine separately the applicants' complaint under Article 13 in conjunction with Article 2 and Article 3 of the Convention (see *Nachova and Others,* cited above, § 123; see also *Dalakov,* cited above, § 90, with further references therein).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

116. The applicants claimed 80,000 euros (EUR) in respect of non-pecuniary damage on account of the unjustified death of their relative (the complaints under Article 2 and 13 of the Convention) and an additional sum of EUR 10,000 on account of the suffering that they endured during the special operation (the complaint under Article 3 of the Convention).

117. The Government contested that claim, reiterating their argument that the case was either inadmissible on various grounds, or that there was no violation of either of the provisions as claimed by the applicants. In the alternative, they asked the Court to make its own assessment of the non-pecuniary damage on an equitable basis and in line with the Court's well-established practice.

118. Having regard to all the circumstances of the present case, the Court accepts that the applicants have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation under Article 2 of the Convention. Making its assessment on an equitable basis, the Court awards the applicants EUR 10,000 jointly in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

119. The applicants claimed reimbursement of 21,412.50 pounds sterling (GBP) for the legal fees of two of their London-based representatives (Mr P. Leach and Mr C. Cojocariu) from the EHRAC in the proceedings before the Court. They also sought reimbursement of about EUR 5,500 for various administrative and translation expenses. They submitted a copy of the legal service contract of the four applicants signed with EHRAC, the detailed time sheets for both lawyers detailing the number of hours worked, the nature of work performed and the lawyers' hourly rates, and various financial documents concerning the administrative and translation expenses.

120. The Government submitted that the applicants had failed to show that the relevant expenses had indeed been incurred, and that they were necessary and reasonable as to quantum. They claimed that the applicants had failed to submit the relevant legal and financial documents showing that the fees of the two London-based lawyers had indeed been incurred, and that in

any event the sums claimed were excessive. As to the administrative and translation costs, they argued that the expenses claimed were unnecessary.

121. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. The Court notes that GBP 13,350 of the legal fees claimed related to a lawyer from EHRAC (Mr C. Cojocariu) whose written authority form was not in the case file (see paragraph 2 above). This part of the claim should accordingly be rejected. As to the remaining claim for costs and expenses, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 15,000, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints under Article 2 of the Convention admissible;

2. *Holds*, unanimously, that there has been a violation of Article 2 of the Convention under its procedural limb;

3. *Holds*, by six votes to one, that there has been no violation of Article 2 of the Convention under its substantive limb;

4. *Declares*, unanimously, the complaint under Article 3 of the Convention inadmissible;

5. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

6. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, by six votes to one, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 January 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Georges Ravarani
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Gnatovskyy is annexed to this judgment.

G.R.
V.S.

PARTLY DISSENTING OPINION OF JUDGE GNATOVSKYY

1. I concur with the Court's conclusions in this case, with one major exception. To my regret, I cannot agree with my colleagues that there has been no violation of Article 2 in its substantive aspect. In my view, such a finding is problematic in the particular circumstances of the case and undesirable in terms of the future development of the Court's jurisprudence on similar matters.

2. The case concerns events of the early morning of 26 December 2017, in the village of Duisi in Georgia, where a 19-year-old Georgian citizen, T.M., while in his bed at home, was fatally shot in the head by a member of the thirty-two-officer team of the Special Assignment Unit (SAU) of Georgia's State Security Service (SSS) which had entered his family's house at around 3.45-4 a.m. to arrest him on charges of providing material support to an ISIS-related terrorist group. The application was lodged by T.M.'s father, mother, grandmother and sister ("the applicants"), who complained under Articles 2, 3 and 13 of the Convention.

3. The most important divergence between the accounts provided by the Government and by the applicants related to the events that had unfolded in T.M.'s bedroom and had resulted in his being shot in the head by an SSS officer. According to the investigation materials quoted by the Government, "T.M., having disregarded the request of the first officer to show his hands and surrender to the arrest, attempted to detonate a hand grenade and as a result was shot in the head" (see paragraph 10 of the judgment). Conversely, the applicants submitted that it had not been proven in a convincing manner by the investigation that T.M. had been holding a hand grenade when the SAU officers had entered his bedroom. According to the applicants, the SAU officers had mishandled the process of seizing, examining and testing the hand grenade; they had also failed to provide satisfactory explanations concerning issues such as T.M.'s exact position at the moment the officers had entered his bedroom; the sequence of events before and during the shooting, including the possibility that the applicant had had his mobile telephone and headphones with him; and the question whether a warning had been issued to T.M. (see paragraph 74 of the judgment). The applicants also stressed that their house had been under the exclusive control of the SSS for at least three hours before the search of T.M.'s bedroom and that this raised serious doubts as to the origin of the hand grenade in the bedroom (see paragraph 51 of the judgment).

4. The Chamber has unanimously found a violation of Article 2 in its procedural aspect as it has been convincingly established that the investigation of T.M.'s killing displayed a number of serious deficiencies. They included, as summarised in paragraph 97 of the judgment:

> "... the defective initial investigative response, including the way in which important evidence was gathered and handled, the superficial examination of the planning and control phase of the operation, the delay in interviewing the SSS officers, and the denial of victim status to the first applicant, which prevented the applicants from appealing against the decision of the prosecutor's office ..."

5. As regards the substantive aspect of Article 2, the judgment first deals with the key issue of the burden of proof. Paragraph 104 of the judgment contains this crucial passage:

> "... the situation in the present case cannot be equated to a death in custody or to other situations where the authorities were in control, with the result that the burden of proof may be regarded as resting on the State ..."

6. Further arguments for finding no violation of the substantive aspect of Article 2 are also advanced. In that same paragraph the Chamber notes:

> "... a hand grenade with blood stains which corresponded to the genetic profile of T.M. was seized from the latter's bedroom ... and ... it cannot be said that the authorities failed to provide a plausible explanation for the events leading to the death of T.M. ..."

The Chamber then states:

> "... the evidence before it renders impossible the assessment of the above conflicting versions, irrespective of the fact that this derives, at least in part, from the shortcomings of the investigation. While it is undisputed that T.M. died as a result of the fatal wound he received in the course of the security operation for his arrest, no judicial assessment of the exact circumstances which led to the firing of the fatal shot was conducted at the domestic level ..."

Further arguments are added in paragraph 105 of the judgment, such as the lack of a "sound basis on which to assess the situation in which the officer, who was required to react in the heat of the moment, found himself", reference to the duty of the European Court of Human Rights to "be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case" and a reminder that "errors of judgment or mistaken assessments, unfortunate in retrospect, will not *per se* entail responsibility under Article 2 of the Convention" (references omitted). The subsequent paragraph concludes with a finding of no violation of the substantive aspect of Article 2 "in the specific circumstances of the present case".

7. Unfortunately, I remain unconvinced by the arguments put forward in the judgment to support the finding of no violation of Article 2 in its substantive aspect. I will concentrate mostly on the question of the burden of proof, after which I will briefly address other problematic statements that purportedly have a bearing on the conclusion regarding the substantive aspect of Article 2.

8. Indeed, the key problematic issue in this case concerns the relationship between the substantive and procedural limbs of Article 2 of the Convention. My first and predominant concern about the path of argumentation chosen by my colleagues is that it stands in contradiction to the case-law of the Court

on the standard and burden of proof as applied in situations *where the events lie wholly, or in large part, within the exclusive knowledge of the authorities.* This is different from the question *whether the authorities were in full physical control of the victim*, which is dealt with in paragraphs 104 and 105 of the judgment in a rather contradictory manner (see below). However, it is the former question which is critical for the present case.

9. It must be noted that the authorities had exclusive control of the key evidence that could shed light on the disputed events. It was up to the authorities to establish to the extent possible through an effective official investigation whether, as the Government claimed, T.M. had been about to detonate a hand grenade in response to the oral warning issued by an SSS officer or, as the applicants asserted, he had been using his mobile telephone while wearing earphones and had not heard the warning (if any), and the hand grenade had later been planted by the SSS.

10. There exists clear authority, representing what is in my view a positive development in the Court's case-law, for the proposition that strong presumptions of fact arise in respect of injuries and death that occur in situations where the events lie wholly or in large part within the exclusive knowledge of the authorities. In such cases, the burden of proof shifts and it is for the respondent Government to explain, in a satisfactory and convincing manner, the sequence of events and to provide solid evidence to refute the applicant's allegations (see, in particular, *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 586, 13 April 2017, and *Mansuroğlu v. Turkey*, no. 43443/98, § 80, 26 February 2008). In the absence of such explanation, the Court can draw inferences which may be adverse to the Government. In my view, the Court should have adhered to the same approach in the present case as none of the arguments presented by the Government amounted to a *satisfactory and convincing explanation*. Instead, the majority satisfied themselves with a *plausible version of events* provided by the Government (see paragraphs 104 and 106 of the judgment). If adopted by the Court beyond the limits of the present case, this approach risks dangerously lowering the standard of protection of the right to life.

11. As already mentioned, the judgment makes the point that "the situation in the present case cannot be equated to a death in custody or to other situations where the authorities were in control" (see paragraph 104 of the judgment). Having dealt with the issue of the burden of proof in the preceding three paragraphs of this opinion, I would further point out that the actual statement that the authorities were not in control is also problematic, not because there is convincing evidence that the victim was under the arresting officers' full control, but because it is simply impossible to know to the required degree of certainty what exactly happened in T.M.'s bedroom immediately before and for several hours after he was shot in the head. The judgment in a way confirms this, in a rather self-contradictory manner, in paragraph 105, where it states that the Court "has no sound basis on which to

... find that T.M. was under the control of the SAU officers at the moment when they entered the room". Indeed, the Court does not know whether T.M. was under the control of the officers when the fatal shot was fired, and therefore the appropriate standard is that which falls to be applied in situations "where the events lie wholly, or in large part, within the exclusive knowledge of the authorities".

12. It is also necessary to deal with the arguments advanced in the judgment that may be construed as supporting the choice not to find a violation under the substantive limb of Article 2. First, while I agree with the assessment as to the existence and scope of the legal framework for the use of lethal force by law enforcement officers, including the SAU/SSS (see paragraph 100 of the judgment), the assessment of the planning phase of the operation set out in paragraphs 101-102 appears unduly lenient. As correctly stated in paragraph 102:

> "... the Government failed to submit any documents or files providing for the procedures that the SAU employed before, during, and after the operation in question ... Formal reports concerning the manner in which the operation was prepared and/or in which it unfolded are also missing from the investigation file and the Government provided no explanation in this regard ..."

Further, paragraph 103 provides a clear example of deficient planning of the "operation involving a large number of armed officers and aimed at arresting, according to the official version of events, a potentially armed terrorist" in so far as the authorities failed to arrange for an ambulance to be present, even if there is no evidence that the presence of the ambulance would actually have saved T.M.'s life given the gravity of the injury that he sustained (see paragraph 39 of the judgment). Unfortunately, the majority refrain from drawing any conclusions from these failures by the authorities other than to say that "there is nothing to suggest that the SAU officers were not intending to carry out an arrest, as per the stated purpose of the operation" and they accept the Government's assertion that the authorities had valid reasons to expect armed resistance from T.M. (see paragraph 102 of the judgment).

13. Reference is also made to the fact that "a hand grenade with blood stains which corresponded to the genetic profile of T.M. was seized from the latter's bedroom" in paragraph 104 in support of the *plausibility* of the version of events presented to the Court by the Government. This reference appears to be rather unfortunate as it merely repeats the Government's version of events which, in the absence of an effective investigation, carries no more weight than the applicants' allegation that a hand grenade was planted in T.M.'s bedroom by the arresting officers. It is noteworthy that, according to the fingerprint analysis described in paragraph 34 of the judgment, traces on the hand grenade were not sufficient or suitable for identification purposes and thus no useable fingerprints could be obtained. As regards the presence of T.M.'s blood on the hand grenade, this does not appear to be in any way

conclusive, as immediately after the incident his blood was present on a number of surfaces in the room (see, for example, paragraphs 42-43 of the judgment).

14. In sum, the resolution of the present case hinges on the need to assess whether the shooting of T.M. satisfied the "absolute necessity" standard under Article 2 § 2 of the Convention on the basis of conflicting accounts provided by the applicants and the Government, the latter having failed to conduct an effective investigation of the incident in compliance with the standards formulated in the Court's case-law. Whilst the violation of the procedural limb of Article 2 is rather uncontroversial, I have major concerns that the finding of no violation of the substantive aspect of the right to life may send a wrong message to the States parties to the Convention.

15. As aptly mentioned in a recent monograph on the Court's case-law related to the right to life, "the ECtHR's interpretation and application of Article 2(2) has resulted in a difficult combination of apparently robust norms with a generally sympathetic approach to contextual contingencies"[1]. Such a "sympathetic approach" to exceptions regarding the use of lethal force by State agents cannot, nevertheless, be unlimited. In my view, it is highly desirable for the Court to be more demanding in situations where no effective investigation has been carried out and where the Government has failed to explain the sequence of events in a satisfactory and convincing manner and provide solid evidence to refute the applicant's allegations.

16. Quite separately from the present case, in which I believe Article 2 was violated in both its procedural and substantive aspects, there may be situations where the Court, in addressing an alleged violation of the substantive aspect of Article 2 whilst also finding that the authorities failed to carry out an effective investigation, is faced with a sort of *non liquet* situation. A solution to this problem, worth considering in some (admittedly not all) such cases, may be to refrain from sending, in the same judgment, two contradictory signals – one of violation and one of no violation. A violation of the procedural aspect of Article 2 is still a violation of one of the most fundamental rights enshrined in the Convention. It may therefore be preferable to analyse both aspects while nevertheless distilling that analysis into a single conclusion that there has been a violation of the Article as a whole. Otherwise, it will be far too easy, for those minded to downplay the significance of the Court's finding of a violation, to say that no violation of the substantive aspect is a more important outcome of the case than the violation of the procedural obligation. In other words, when the authorities fail to investigate effectively and to furnish the Court with the information it requires to come to a definitive conclusion as to the presence or absence of a violation, they should not be "rewarded" with a finding of no violation that

[1] Stephen Skinner, *Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy*, (Hart Publishing, 2019), p. 84.

can then easily be publicised in a light favourable to them. This suggestion applies only to some cases, but it may be a reasonable option in the modern world of information and misinformation, truth and post-truth.

APPENDIX

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1	Malkhaz MACHALIKASHVILI	1968	Georgian	Duisi
2	Elene MACHALIKASHVILI	1949	Georgian	Akhmeta
3	Nata MACHALIKASHVILI	1989	Georgian	Duisi
4	Aiza MARGOSHVILI	1971	Georgian	Duisi